NPL v. SKS

HIGH COURT MALAYA, JOHOR BAHRU
EVROL MARIETTE PETERS JC
[ORIGINATING SUMMONS NO: JA-24F-313-12-2020]
3 APRIL 2022

Abstract – *Any disregard of a court order is a grave matter, more so when such order relates to a child, as in the present case. The terms of the court order were consented to by both parties and were stipulated in the interests of the welfare of the child. The wife's conduct of refusing to comply with the terms of the court order, which was premised on the acrimony between herself and her husband, and the baseless, unsubstantiated and spurious allegations made by her against her husband proved that her conduct was mala fide and amounted to a gross violation of the court order. The fact that the wife refused to apologise, or to undertake not to further breach the terms of the court order, warranted a harsh sentence, thus the husband's application for an order of committal against the wife is allowed.*

CIVIL PROCEDURE: *Committal order – Application for – Application for order of committal against wife for non-compliance with court order regarding custody, care and control of child – Whether pre-requisites in O. 52 rr. 2B and 4(3) of Rules of Court 2012 complied with – Whether wife breached terms of court order – Whether there was wilful refusal to comply with terms of court order – Whether custodial sentence warranted*

This was the respondent husband's application ('this application') for, *inter alia*, an order of committal against the applicant wife ('applicant') for non-compliance with the order for interim custody, care and control ('court order'), where the applicant had failed to send the child of the marriage, one SYT ('child'), aged five years at the material time, to the respondent's residence on the days and times stipulated in the court order. The court order was recorded between both parties by way of consent, where it was agreed, *inter alia*, that the applicant was granted custody, care and control of the child; whilst the respondent was given supervised access to the child where the applicant would send the child to the respondent's residence for the purpose of the access. The applicant failed to comply with the court order, and as a result thereof, the respondent was denied physical access to the child since 10 May 2021. At the outset, the applicant raised a preliminary objection against this application, in that, the respondent had not complied with the pre-requisites in O. 52 r. 2B and 4(3) of the Rules of Court 2012 ('ROC'). The other issues that were raised were (i) whether the applicant had

breached the terms of the court order; (ii) whether there was wilful refusal to comply with the terms of the court order; and (iii) whether a custodial sentence was warranted.

Held (allowing application):

(1) The respondent had sent several notices to show cause *via* letters to the applicant, one of which was dated 11 May 2021, which was also sent by the respondent to the applicant *via* WhatsApp, the justification being that the applicant had moved out from the matrimonial home sometime in early May 2021, and that the respondent was unaware of the whereabouts of the applicant as well as the child at the material times. The show cause notices sent to the applicant's solicitors and the WhatsApp messages to the applicant directly were sufficient to comply with the requirements of O. 52 r. 2B of the ROC. (paras 10-12)

(2) The applicant's then solicitors, Messrs GK, had responded on behalf of the applicant and had provided justification to the show cause notice, before they ceased to act for her and in that response, there was no denial of the breach of the court order. It was undeniable that the applicant had received and read these notices and WhatsApp messages, as this was evidenced by her own posts on her Facebook account of the exchange of WhatsApp messages between her and the respondent which contained, amongst others, the show-cause notices from the respondent's solicitors and the respondent's message demanding her to comply with the court order, failing which committal proceedings would be commenced against her. Furthermore, when the court order was recorded, the applicant herself was present in court, and had eventually consented to the terms of access to be given to the respondent, after lengthy negotiations in court itself. The specific days and times of access given to the respondent were stipulated in detail in the court order, to which the applicant had agreed. The applicant was fully aware of the court order that she had not complied with. Thus, even if O. 52 r. 2B of the ROC was literally not complied with, such non-compliance was not fatal or prejudicial to the applicant. (paras 13-17)

(3) The respondent had served the cause papers on the applicant by way of personal service though an advocate and solicitor ('Ang') who had affirmed in his affidavit of service that he had called the applicant informing her that he had arrived at the guard house of the condominium where she had then resided, to serve the cause papers on her. The applicant had requested Ang to leave the cause papers with the security guard. It was thus inequitable for her to now claim that she had not been served with the same personally. It also transpired that the applicant had sent a voice message to Ang expressing her displeasure that the cause papers were not inserted into an envelope, which was indicative that the cause papers were in fact served on the applicant. Therefore, the

respondent complied with O. 52 r. 4(3) of the ROC by serving on the applicant the cause papers by way of personal service. The cause papers were also served on the applicant by way of email, which she herself admitted. Hence, it was not a case where the applicant was unaware, or prejudiced. (paras 20-22)

(4) Despite the attempts made by the respondent to serve the necessary notices and documents personally on the applicant, it was obvious that she was in fact evading service. This was an extremely unjust scenario as the applicant was relying on her own wrongful conduct to claim that personal service was not effected on her. This was conduct that could not be condoned whatsoever by this court, and as such, in the interest of justice and fairness, the service effected on the applicant by the respondent was sufficient to fulfil the requirements of both rr. 2B and 4(3) of O. 52 of the ROC. The applicant's preliminary objection on both grounds was dismissed. (paras 23 & 25)

(5) The court order was an order which terms were consented to by the parties. As such, non-compliance of the terms consented to by the applicant herself amounted to non-compliance of the court order. The applicant had failed to send the child to the respondent's residence since 10 May 2021. The applicant had not denied breaching the terms of the court order, but that she had provided a litany of excuses for failing to do so. The chaos and raucous surrounding the child whenever the applicant was due to send the child to the respondent was actually caused by the applicant herself. In fact, the applicant herself had stated that she was traumatised by the prior conduct of the respondent in taking the child away from the applicant and hence, her reluctance to part with the child. (paras 27, 28, 33, 35 & 36)

(6) These averments of trauma and ordeal were exaggerated and dramatised by the applicant, as a leverage to deny the respondent access. The references made by the applicant to the previous conduct of the respondent were prior to the court order and had no relevance whatsoever to the applicant's legal duty to comply with the court order. This was no excuse for non-compliance with a court order, as the terms of the court order had been agreed upon. Furthermore, the so-called trauma and ordeal that the applicant claimed to have been subjected to were her own issues, which she should not have used to deny the respondent his right as a father to see his child, and the opportunity for the child to bond with her father. The applicant's refusal to comply with the terms of the court order was premised on the acrimony between herself and the respondent. The baseless, unsubstantiated and spurious allegations were indicative of the applicant's wilful refusal to comply with the terms of the court order. (paras 37 & 48)

(7) The applicant remained nonchalant, unapologetic and unremorseful about disobeying the court order. Instead of making an effort to comply with such terms, or suggest alternative days to replace the days she had missed, she was adamant that the respondent should not be given physical assess at all in the future. As such, the committal was proved beyond a reasonable doubt. Her conduct was *mala fide*, and amounted to a gross violation of the court order. It was also indicative of her impertinence and total disrespect to the court, which this court took an extremely dim view of. The fact that the applicant had refused to apologise or to undertake not to further breach the terms of the court order, fortified the respondent's argument that a harsh sentence was warranted. The applicant's argument that a custodial sentence would be detrimental to the child did not hold water as the applicant should have thought about the implications of her conduct in breaching the terms of the court order. Thus, the applicant was ordered to pay a fine of RM10,000, failing which, a custodial sentence in the form of a 14 days imprisonment term would be imposed on her. (paras 49, 52, 57 & 58)

Case(s) referred to:

Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 HC ***(foll)***
Chuck v. Cremer (1846) 1 Coop t Cott 205 ***(refd)***
Fairclough & Sons v. Manchester Ship Cane Co (No 2) [1897] WN 7 ***(refd)***
Ganapathy Chettiar v. Lum Kum Chum & Ors And Another Appeal [1981] 1 LNS 59 FC ***(refd)***
Golden Star & Ors v. Ling Peek Hoe & Ors [2021] 3 CLJ 443 FC ***(refd)***
Hadkinson v. Hadkinson [1952] 2 All ER 567 ***(refd)***
Kamil Azman Abdul Razak & Ors v. Amanah Raya Bhd & Ors [2019] 6 CLJ 419 FC ***(refd)***
Kengadharan Ramasamy & Anor v. Perdana Menteri Malaysia & Anor [2020] 1 LNS 1451 HC ***(dist)***
Lee Heng Moy & Ors v. Pacific Trustees Bhd & Ors [2016] 6 CLJ 368 CA ***(refd)***
Lokman Noor Adam v. PP [2020] 10 CLJ 435 CA ***(refd)***
Nilima Islam v. Ketua Polis Negara & Ors [2021] 1 LNS 197 HC ***(dist)***
Peguam Negara Malaysia v. MKini Dotcom Sdn Bhd & Anor [2020] 7 CLJ 173 FC ***(refd)***
Tan Boon Thien & Anor v. Tan Poh Lee & Ors [2020] 3 CLJ 28 CA ***(refd)***
Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC ***(refd)***
Tan Poh Lee v. Tan Boon Thien [2022] 2 CLJ 719 FC ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***
TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 LNS 126 FC ***(dist)***
Tong Lee Hwa & Anor v. Chin Ah Kwi & Another Appeal [1971] 1 LNS 143 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 13
Federal Constitution, art. 126
Rules of Court 2012, O. 52 rr. 2B, 3, 4(3)

For the applicant – Amin Othman; M/s Hafarizam Wan & Aisha Mubarak
For the respondent – Allison Ong Lee Fong; M/s Allison Ong & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Evrol Mariette Peters JC:

Introduction

[1] This is the respondent husband's application in encl. 29 ("this application") for, *inter alia*, an order of committal against the applicant wife for non-compliance with the order for interim custody, care, and control, dated 28 April 2021 ("court order"), where the applicant had failed to send the child of the marriage, one SYT ("the child"), aged five years at the material time, to the respondent's residence on the days and times stipulated in the court order.

The Factual Background

[2] The court order was recorded between both parties by way of consent, where it was agreed, *inter alia*, that the applicant was granted custody, care and control of the child; whilst the respondent was given supervised access to the child, every Sunday between 1pm and 8pm, Monday between 4pm and 7pm, and Tuesday between 4pm and 7pm, where the applicant would send the child to the respondent's residence for the purpose of the access.

[3] The applicant had failed to comply with the court order, and a result thereof, the respondent was denied physical access to the child since 10 May 2021.

[4] Leave to file this application was granted on 29 June 2021, and this application, which was filed on 5 July 2021, was allowed, for the following reasons.

Contentions, Evaluation, And Findings

[5] At the outset, the applicant raised a preliminary objection, in that the respondent had not complied with the pre-requisites in O. 52 rr. 2B and 4(3) of the Rules of Court 2012 ("Rules of Court").

Whether There Was Non-compliance With O. 52 r. 2B Of Rules Of Court

[6] The applicant contended that there no formal show-cause notice was served on her personally under O. 52 r. 2B of the Rules of Court, which reads:

A Order 52 – Committal

…

Rule 2B – Other cases of contempt

In all other cases of contempt of Court, **a formal notice to show cause** why he should not be committed to the prison or fined **shall be served personally.** (emphasis added)

[7] The applicant, in relying on the Court of Appeal cases of *Lokman Noor Adam v. PP* [2020] 10 CLJ 435 and *Tan Boon Thien & Anor v. Tan Poh Lee & Ors* [2020] 3 CLJ 28, contended that a deviation from O. 52 r. 2B of the Rules of Court is not allowed under any circumstances. I was unable to agree with the applicant's contention as it was crucial to note that the Federal Court in *Tan Poh Lee v. Tan Boon Thien* [2022] 2 CLJ 719, in adopting a different approach from the Court of Appeal, had explained the philosophy of O. 52 r. 2B of the Rules of Court, through Nallini Pathmanathan FCJ, in the following passages:

… This is in keeping with one of the twin pillars of natural justice, namely *audi alteram partem*, or simply that the person accused of a wrong must know precisely the charge made against him. *Order 52 r. 2B is an encapsulation of that principle, so as to ensure that the contemnor is aware of the charge made against him. However, this is not equivalent to a stricture that the alleged contemnor has to be given several notices regarding the alleged contravention.*

[8] That does not mean either, that O. 52 r. 2B encapsulates a strict set of procedures that has to be followed meaninglessly, such that several notices are issued sequentially. The law does not believe in surplusage.

[9] The notice referred to in O. 52 r. 2B is to be issued at the behest of the court, and not the parties. Private parties do not issue notices to show cause to each other. It is what the court does. It is after all, the order of court which has been breached. And it is therefore the court that ensures compliance and redresses any contravention. And that is therefore what O. 52 r. 2B is concerned with - ensuring compliance and redressing non-compliance.

[10] It then follows that such a notice can only come into being after the initiation of contempt proceedings by making the requisite application to court. And that is why the notice in O. 52 r. 2B ties in with the documents referred to in O. 52 r. 4(3).

[11] In this context, we respectfully concur with the decision of *Lim Chong Fong J in Tang Hak Ju v. Pengarah Tanah Dan Galian Pulau Pinang & Ors* [2017] 2 CLJ 345 that the notice to show cause referred to in O. 52 r. 2B refers to the documents stated in O. 52 r. 4(3), particularly the notice of application itself.

[12] *If O. 52 r. 2B is construed otherwise, it would require a litigant seeking to enforce a court order (which ought to be complied with expeditiously, if not forthwith) to send a pre-notice as a mandatory requirement, before being able to even initiate committal proceedings, notwithstanding that both the litigant and the alleged contemnor are fully aware of the order of court*.

[13] Any such commencement of contempt proceedings in turn, would require further compliance with O. 52 r. 4(3), which means that the documents specified there would have to be served personally a second time. And that too for an order of court, to which the alleged contemnor was fully privy, or ought to have notice of.

[14] The time expended would be far too long. There would, moreover, be surplusage in the need for a pre-notice followed by further personal service in relation to the documents under O. 52 r. 4(3). After all, it is the failure to comply with the order of court that is the primary subject matter of consideration.

[15] We concur with the appellant's submissions that while contempt proceedings may well entail criminal consequences, and that great care must be taken in contempt proceedings, bearing in mind the possible consequences to the liberty of a person, such consideration must be balanced against the equally important requirement that court orders must be complied with strictly. (emphasis added)

[8] This court's attention was also brought to the Federal Court cases of *Peguam Negara Malaysia v. MKini Dotcom Sdn Bhd & Anor* [2020] 7 CLJ 173, and *Golden Star & Ors v. Ling Peek Hoe & Ors* [2021] 3 CLJ 443; [2021] 2 AMR 529. In the latter case, it was stated by Hasnah Mohammed Hashim FCJ in the following passage:

… Firstly, on the issue of personal service, under O. 52 r. 2B of the Rules of Court 2012, **the question whether the failure to comply with the rule is fatal or not depends on the fact of the case and whether it has prejudiced the proposed contemnor in this case HK.** This court in *Peguam Negara Malaysia v. Mkini Dotcom Sdn Bhd & Anor* [2020] 7 CLJ 173 held that non-compliance with the requirement of notice pursuant to O. 52 r. 2 B is not fatal or prejudicial. **On the facts of the case before us, we are of the view that the failure by the applicants to serve the notice personally on HK is neither fatal nor prejudicial to him.** On the issue in relation to intitulement, we do not find any merit in the argument that the failure to cite the name of HK in the intitulement is fatal. With regard to the O. 52 statement, we find that sufficient particulars of the alleged contempt by HK have in fact been stated in the statement itself.

(emphasis added)

[9] As such, non-compliance with O. 52 r. 2B of the Rules of Court is not always fatal as it would have to depend on the facts and circumstances of the case. It was, therefore, important to determine whether the failure, if at all, to comply with O. 52 r. 2B of the Rules of Court had, in any way, prejudiced the applicant.

[10] The respondent submitted that the notice to show-cause *via* letter dated 4 May 2021 was first sent to the applicant's then solicitors, Messrs GK Sritharan & Co ("Messrs GK") who had responded on 4 May 2021 that the applicant had not deliberately breached the terms of the court order but had

done so because the child had refused to go to the respondent. A subsequent show-cause notice *via* letter dated 5 May 2021 was issued by the respondent's solicitors to the applicant *via* Messrs GK, but on 6 May 2021, Messrs GK further responded to say that they were no longer acting for the applicant.

[11] After being informed as such, the respondent's solicitors issued a further show-cause notice *via* letter dated 11 May 2021 to the applicant herself. The show-cause notice dated 11 May 2021 was also sent by the respondent to the applicant *via* WhatsApp, the justification being that the applicant had moved out from the matrimonial home sometime in early May 2021, and that the respondent was unaware of the whereabouts of the applicant as well as the child at the material times until early July 2021.

[12] In my view, the show-cause notices sent to the applicant's solicitors and the WhatsApp messages to the applicant directly were sufficient to comply with the requirements of O. 52 r. 2B of the Rules of Court. In any event, even if there was absence of personal service of the show-cause notices, the issue that had to be addressed was whether the applicant was prejudiced by the same. In my view, the answer to that was in the negative for the following reasons.

[13] First and foremost, her then solicitors, Messrs GK, had responded on behalf of the applicant, and provided justification to the show-cause notice. Messrs GK had responded before they had ceased to act for her and in that response, there was no denial of the breach of the court order.

[14] Secondly, it was undeniable that the applicant had received and read these notices and WhatsApp messages, as this was evident by her own posts on her Facebook account of the exchange of WhatsApp messages between her and the respondent which contained, amongst others, the show-cause notices from the respondent's solicitors and the respondent's message demanding her to comply with the court order, failing which committal proceedings would be commenced against her.

[15] Furthermore, when the court order was recorded, the applicant herself was present in court, and had eventually consented to the terms of access to be given to the respondent, after lengthy negotiations in court itself. The specific days and times of access given to the respondent were stipulated in detail in the court order, to which the applicant had agreed.

[16] It is pertinent to note that 'the Rules of Court ensures that the potential contemnor is fully safeguarded. This takes the form of O. 52 rr. 3 and 4 of the Rules of Court. As such, there is no basis on which to construe O. 52 r. 2B of the Rules of Court as imposing a further mandatory requirement for a pre-notice prior to even initiating contempt proceedings against a contemnor who has been party to, and therefore is fully conversant with an order of court made against him or involving him. Such a construction would

defeat the need for prompt and full compliance with orders of court which carry the force of the law:' Per Nallini Pathmanathan FCJ in *Tan Poh Lee v. Tan Boon Thien* [2022] 2 CLJ 719. In the present case, what was crucial to note was that the applicant was fully aware of the court order that she had not complied with.

[17] As such, it was my view that even if O. 52 r. 2B of the Rules of Court was literally not complied with, such non-compliance was not fatal or prejudicial to the applicant, based on the circumstances of the case.

Whether There Was Non-compliance With O. 52 r. 4(3) Of Rules Of Court

[18] The issues surrounding O. 52 r. 2B of the Rules of Court also brought to the forefront the application of O. 52 r. 4(3) of the Rules of Court, which the applicant alleged that the respondent had failed to comply with. The provision reads:

> Order 52 – **Committal**
>
> …
>
> Rule 4 – **Application for order after leave to apply granted**
>
> …
>
> (3) Subject to paragraph (4), the notice, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 3 and the order granting such leave, **must be served personally on the person sought to be committed.** (emphasis added)

[19] The applicant claimed that she had not received the cause papers for the *ex parte* application for leave ("the cause papers"), by way of personal service, pursuant to O. 52 r. 4(3) of the Rules of Court. She claimed that she had, instead, received the cause papers from the respondent's solicitors, only by way of email dated 6 July 2021.

[20] The respondent contended that he had served the cause papers on the applicant by way of personal service on 8 July 2021 through one Mr Ang Wei Jun ("Mr Ang"), an advocate and solicitor, who had affirmed in his affidavit of service that he had called the applicant on 8 July 2021, informing her that he had arrived at the guard house of the condominium where she had then resided, to serve the cause papers on her. The applicant, however, had informed him that it was inconvenient for her to go to the guard house at that material time, and had therefore, instructed Mr Ang to leave the cause papers with the security guard. Mr Ang had done as instructed by the applicant and had informed her accordingly.

[21] Since it was the applicant who herself had requested for the cause papers to be left with the security guard, it was inequitable for her to now claim that she had not been served with the same personally. In any event,

A it had transpired that the applicant had sent a voice message to Mr Ang expressing her displeasure that the cause papers were not inserted into an envelope. This was indicative that the cause papers were in fact served on the applicant.

B **[22]** Based on the aforesaid, it was my view that the respondent had, in fact, complied with O. 52 r. 4(3) of the Rules of Court by serving on the applicant the cause papers by way of personal service. In any event, the cause papers were also served on the applicant by way of email on 6 July 2021, which she herself has admitted. Hence, it could not have been a case where the applicant was unaware, or prejudiced.

C **[23]** Looking at the facts holistically, despite the attempts made by the respondent to serve the necessary notices and documents personally on the applicant, it was obvious that she was in fact evading service. This was an extremely unjust scenario as the applicant was relying on her own wrongful conduct to claim that personal service was not effected on her. This was D conduct that could not be condoned whatsoever by this court, and as such, in the interest of justice and fairness, it was my view that the service effected on the applicant by the respondent was sufficient to fulfil the requirements of both rr. 2B and 4(3) of O. 52 of the Rules of Court.

E **[24]** In the final analysis, a balance ought to be struck between procedural requirements in relation to committal applications and non-compliance with orders of a court, which is a grave matter. As stated by Low Hop Bing J (as he then was) in *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp 518, 'if committal orders are to be set aside on purely technical grounds which have nothing to do with the justice of the case, then this has the effect of F undermining the system of justice and the credibility of the court orders.

[25] Based on the aforesaid, the applicant's preliminary objection on both grounds was dismissed.

Whether The Applicant Had Breached The Terms Of The Court Order

G **[26]** The court order was an order which terms were consented to by the parties. On that score, it is worth noting the comments by Mary Lim JCA (as she then was) in *Lee Heng Moy & Ors v. Pacific Trustees Bhd & Ors* [2016] 6 CLJ 368, in the following passage:

H > It is fairly settled and trite law that an **order of the court reached by consent of the parties involved is in effect a contract between those parties:** *Ganapathy Chettiar v. Lum Kum Chum & Ors And Another Appeal* [1981] 2 MLJ 145. Such a consent order must therefore be given its full contractual effect – see *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301; [2004] 3 MLJ 465. **Such an order remains valid, effective and binding on all the** I **parties involved until and unless the order is set aside for some vitiating reason** – see the Federal Court's decision in *Tong Lee Hwa & Anor v. Chin Ah Kwi & Another Appeal* [1971] 1 LNS 143; [1971] 2 MLJ 75. In fact, until

that happens, until and unless the consent order is set aside, the consent order operates as an estoppel disallowing the defendants today from departing from its terms. (emphasis added)

[27] A consent order is akin to a contract with superadded command of the court: *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301; [2004] 3 MLJ 465. Reference was also made to a plethora of cases including *Ganapathy Chettiar v. Lum Kum Chum & Ors And Another Appeal* [1981] 1 LNS 59; [1981] 2 MLJ 145; *Tong Lee Hwa & Anor v. Chin Ah Kwi & Another Appeal* [1971] 1 LNS 143; [1971] 2 MLJ 75; and *Kamil Azman Abdul Razak & Ors v. Amanah Raya Bhd & Ors* [2019] 6 CLJ 419.

[28] As such, non-compliance of the terms consented to by the applicant herself amounted to non-compliance of the court order.

[29] The law on contempt is trite and was stipulated in the Federal Court case of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849, where it was stated by Arifin Zakaria CJ, in the following passages:

[20] … *Oswald's Contempt of Court* (3rd edn.) at p.6 gives a general definition of contempt of court as follows:

> To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants, or their witnesses during the litigation.

[21] The jurisprudence for arming the court with the power to punish a contempt is best expounded by Brown J in *Re H E Kingdon v. S C Goho* [1947] 1 LNS 87 as follows:

> But the root principle on which this inherent power to punish for contempt is founded, and the purpose for which it must be exercised, is not to vindicate the dignity of the individual judge or other judicial officer of a Court or even of the Court itself, but to prevent an undue interference with the administration of justice in the public interest.

[22] Hence, the power to punish a contempt is not derived merely from statute nor truly from common law but instead flows from the very concept of a court of law. (See *Borrie & Lowe's The Law of Contempt*, 3rd edn., at p. 65; and Master Jacob [1970] 23 Current Legal Problems 23).

[30] 'It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void': per Romer LJ in *Hadkinson v. Hadkinson* [1952] 2 All ER 567.

[31] 'A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed': per Lord Cottenham LC in *Chuck v. Cremer* (1846) 1 Coop t Cott 205; 47 ER 820.

[32] The standard of proof that the respondent had to attain to prove the breach of the terms of the court order was beyond a reasonable doubt.

Whether There Was Wilful Refusal To Comply With The Terms Of The Court Order

[33] The respondent claimed that the applicant had failed to send the child to the respondent's residence since 10 May 2021. A perusal of the applicant's submission indicated that she had not denied breaching the terms of the court order, but that she had provided a litany of excuses for failing to do so. The starting point was the response from her then solicitors, Messrs GK, *via* letter dated 4 May 2021, where it was stated:

> …
>
> Our client has instructed us to inform you that **she did not purposely defy the terms** of the Court Order dated 18/4/2021, as alleged in your letter.
>
> Instead our client had a lot of difficulties with the child who cried and resisted meeting your client. This caused delay in giving your client access to the child. Our client has in her possession recording of the child's refusal to meet your client. (emphasis added)

[34] Based on her response, through Messrs GK, it was undeniable that she had breached the terms of the court order. However, the gist of her contention was that the breaches she had committed were justified, and in a nutshell, her reasons ranged from her claims that the child's school schedule did not fit into the times of the respondent's access, that the child was ill with a cough during the times that the respondent was entitled to access, that she was afraid that the respondent would run away with the child as she claimed he had done before, her oversight about the time, the lockdown due to the Covid-19 pandemic, and her averment that the child was reluctant to meet with the respondent, and even insinuated that the respondent had abused the child.

[35] In my view, these were feeble excuses provided by the applicant to justify her blatant refusal to comply with the terms of the court order.

[36] I had painstakingly scrutinised the documentary evidence filed by both parties, and my finding was that the chaos and raucous surrounding the child whenever the applicant was due to send the child to the respondent, was actually caused by the applicant herself. In fact, the applicant herself had stated that she was traumatised by the prior conduct of the respondent in taking the child away from the applicant, and hence her reluctance to part with the child.

[37] In my view, these averments of trauma and ordeal were exaggerated and dramatised by the applicant, as a leverage to deny the respondent access. Secondly, the references made by the applicant to the previous conduct of the respondent were prior to the court order and had no relevance whatsoever to the applicant's legal duty to comply with the court order. Thirdly, this was no excuse for non-compliance with a court order, as the terms of the court order had been agreed upon. Furthermore, the so-called trauma and ordeal that the applicant claimed to have been subject to were her own issues, which she should not have used to deny the respondent his right as a father to see his child, and the opportunity for the child to bond with her father.

[38] The applicant in relying on *Kengadharan Ramasamy & Anor v. Perdana Menteri Malaysia & Anor* [2020] 1 LNS 1451 and *Nilima Islam v. Ketua Polis Negara & Ors* [2021] 1 LNS 197, had submitted at length that her refusal to send the child to the respondent's residence was due to the lockdown which was necessitated by the Covid-19 pandemic.

[39] I found this argument untenable for the following reasons. First and foremost, the total lockdown was implemented on 1 June 2021. In the present case, there were breaches of the terms of the court order since 10 May 2021. Secondly, even during the lockdown in 2021, exceptions were made for the mobility of persons.

[40] The cases relied on by the applicant are also distinguishable. In *Kengadharan Ramasamy & Anor v. Perdana Menteri Malaysia & Anor* the learned judge had to deal with the Parliamentary sitting on 18 May 2020, which was during the early stages of the Covid-19 pandemic, where more restrictions were implemented as the country was under a Conditional Movement Control Order or CMCO.

[41] In *Nilima Islam v. Ketua Polis Negara & Ors*, the learned judge had merely recognised the unprecedented effects of the Covid-19 pandemic which resulted in the difficulty faced by the solicitors in gaining access to their client, who was under detention.

[42] In the present case, all that the applicant had to do was to send the child to the respondent's residence for access that was to be supervised by the applicant. I was unable to see how complying with the court order was

impossible simply because of the Covid-19 pandemic. In my view, these were feeble excuses adduced by the applicant to ensure that the respondent was denied access to the child.

[43] The applicant had also contended that the respondent had not made full disclosure to this court with regard to this application. In my view, after scrutinising the affidavits and documents with a fine-tooth comb, I was unable to agree with the applicant, as the only disclosure required for this application was whether the applicant had breached the terms of the court order.

[44] It was also crucial to note that the terms of the court order had been agreed upon by the applicant herself and were documented in the court order. Instead of complying with the terms of the court order, the applicant had gone to the extent of suggesting changes to such terms, which in my view were unacceptable, in light of the terms of the court order.

[45] The applicant contended that she had no intention of breaching the terms of the court order and that she had done so in the interest of the child. In support of this contention, the applicant relied on the Federal Court case of *TO Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126, in particular the words of Lee Hun Hoe CJ (Borneo), where in citing the case of *Fairclough & Sons v. Manchester Ship Cane Co. (No 2)* [1897] WN 7, His Lordship had stated that 'an order of court must have been contumaciously disregarded. It is no good if it is casual, accidental and unintentional.'

[46] In my view, the applicant's contention is misconceived, as 'intention' referred to by Lee Hun Hoe CJ (Borneo) was addressed in the context of clarity and unambiguity of an order of the court. In the present case, the terms of the court order, which the applicant was fully aware of, were crystal clear.

[47] In any event, in the same case that the applicant had relied on, namely, *TO Thomas v. Asia Fishing Industry Pte Ltd,* it was further stated by Lee Hun Hoe CJ (Borneo), in the following passages:

> *Intention is of no consequence in the matter of contempt by disobedience to a court order: A-G v. Walthamstow Urban District Council;* [1895] 11 TLR 533. *Stancomb v. Trowbridge Urban District Council* [1910] 2 Ch. 190. In particular, Donovan LJ expressed his view clearly in *Re A-G's Application, A-G v. Butterworth* [1963] 1 QB 696 in these words:
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> > I conceive the position, however, to be this. *Regina v. Odham's Press Ltd* [1957] 1 QB 73 *ex parte A-G* [1956] 3 All ER 494 makes it clear that an *intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of court. It is enough if the action complained of is inherently likely so to interfere.* (emphasis added)

[48] In any event, a scrutiny of the evidence adduced, indicated that the applicant had every intention of disobeying the terms of the court order, but that she had provided her reasons for doing so, which she felt were justified. However, it was my view that the applicant's refusal to comply with the terms of the court order was premised on the acrimony between herself and the respondent. In fact, the applicant had made several troubling allegations about the respondent and had insinuated that he was responsible for abusing the child based on some bruises that the child had suffered months before this court order was made. These baseless, unsubstantiated and spurious allegations were indicative of the applicant's wilful refusal to comply with the terms of the court order.

[49] Furthermore, the applicant remained nonchalant, unapologetic and unremorseful about disobeying the court order. Instead of making an effort to comply with such terms or suggest alternative days to replace the days she had missed, she was adamant that the respondent should not be given physical access at all in future. As such, the committal was proved beyond a reasonable doubt

[50] At this juncture, it was crucial to remember that the rule pertaining to committal should be applied in all its strictness. Any disregard of a court order is a grave matter, more so when such order relates to a child, as in the present case. The terms of the court order were consented to by both parties and were stipulated in the interests of the welfare of the child – to enable the child to bond and gain familiarity with the respondent, and also to strike a balance between the rights of parties. Parties embroiled in a custody dispute must always bear in mind that the role of the court is not to appease one or the other, but to make decisions in the best interest of the child. This court is also mindful that no matter how undesirable a person may be as a spouse, that does not automatically render him or her an unfit parent. The dynamics of being a spouse differ from that of parenting, and there is no correlation between one and the other.

[51] In some cases, separation or divorce can be a relief to both parties but in most cases, it is not entirely painless. Parties, no matter how much acrimony exists between them, must bear in mind that priority must be given to the child of the marriage, and decisions made by the court, although unfavourable to one or the other, are presumed to be in the best interest of the welfare of the child. Parents of a child of the marriage, no matter how much disdain they may feel towards one another, will remain as parents of that child for as long as that child is alive, and with all things being equal, no one parent is superior to the other. As such, a child must be given the right to bond with both parents. Unfortunately, it is easier said than done, and in some cases one party may inevitably use the child of the marriage to gain leverage in his or her battle with the other. Such conduct can never be condoned by this court.

[52] In my view, all the allegations made by the applicant were unsubstantiated, baseless and spurious. Her conduct was *mala fide* and amounted to a gross violation of the court order. It was also indicative of her impertinence and total disrespect to the court, which this court took an extremely dim view of.

Whether A Custodial Sentence Was Warranted

[53] The power of this court to punish the applicant for contempt of court is found in art. 126 of the Federal Constitution, and s. 13 of the Courts of Judicature Act 1964, both of which read:

Federal Constitution

Article 126 – Power to punish for contempt

The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

Courts of Judicature Act 1964

Section 13 – Contempt

The Federal Court, the Court of Appeal and the High Court shall have power to punish any contempt of itself.

[54] The respondent contended that, considering the circumstances of this case, a custodial sentence was appropriate. The applicant however, submitted that this court should bear in mind that the applicant was a single mother and the primary caregiver of the child, and that a custodial sentence would be detrimental on the child.

[55] In the present case, I had to take note of the following facts:

(i) her wilful and deliberate breach of the terms of the court order;

(ii) her wilful and deliberate continuous breach of the terms of the court order;

(iii) her contumacious attitude in refusing to obey in future, the terms of the court order;

(iv) her unapologetic behaviour; and

(v) her conduct in publishing the show-cause notices and WhatsApp messages on her Facebook account.

[56] With regard to the applicant's conduct, I drew guidance from the case of *Chandra Sri Ram v. Murray Hiebert*, where it was stated that the 'courts must fulfil its responsibilities by passing an appropriate sentence to reflect the extreme seriousness of the instant case, in particular, the respondent's unrelenting interference with due administration of justice and the unmitigated culpability of the respondent as demonstrated in his article. Our

courts would not be doing their duties and indeed would be acting against public interest, especially having regard to the facts and circumstances of the instant case, by imposing a mere fine': per by Low Hop Bing J (as he then was).

[57] The fact that the applicant had refused to apologise, or to undertake not to further breach the terms of the court order, fortified the respondent's argument that a harsh sentence was warranted. The applicant's argument that a custodial sentence would be detrimental to the child does not hold water as the applicant should have thought about the implications of her conduct in breaching the terms of the court order. I drew guidance from *Chandra Sri Ram v. Murray Hiebert*, where it was stated by Low Hop Bing J (as he then was) in the following passages:

> The respondent's affidavit in reply filed in response to the applicant's substantive motion for committal has made no mention of his proposed apology at all. The respondent merely said in para. II of his affidavit in these words "I wish to express regret to this Honourable Court if what I had written is incorrect". *It is absolutely clear to me that the respondent has tendered no apology at all,* but a mere qualified expression of regret. An apology to be effective must be given immediately in the respondent's affidavit in reply in order to show his remorse or repentance at the earliest opportunity, and not as an afterthought, subsequent to a finding of guilt and conviction against him.
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> …
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> *In the absence of an apology or contrition, a contemnor cannot subscribe to an expectation of a less severe sentence. On the contrary, eg, in England, where the contemnor shows no remorse, he can expect to be punished more severely: Burton v. Winters* [1993] 3 All ER 847 CA; *Brewer v. Brewer* [1989] 2 FLR 251; *Nigel Lowe and Brenda Sufrin,* 1996. *"The Law of Contempt"* p. 630.)
>
> … (emphasis added)

Conclusion

[58] In the interest of justice, and after careful scrutiny and judicious consideration of all the evidence before this court, including the written and oral submissions of both parties, this application was allowed. The applicant was ordered to pay, in 14 days' time from the date of this decision (27 January 2022), a fine of MYR10,000, failing which, a custodial sentence in the form of a 14-day imprisonment term would be imposed on her.